

§ 22.16

4 CFR Ch. I (1–1–10 Edition)

and Federal Rules of Evidence which address matters not specifically covered herein.

[73 FR 60610, Oct. 14, 2008]

§ 22.16 Hearings [Rule 16].

(a) *Election of hearing or record submission.* Each party shall inform the Board, in writing, whether it elects a hearing or submission of the case on the record pursuant to § 22.17 of this part [Rule 17]. Such election shall occur no later than 15 days after the conclusion of discovery, unless the Board directs otherwise. In the event that only one party waives a hearing and submits its case on the record, the Board shall proceed with a hearing attended by the remaining parties.

(b) *Pre-hearing schedule.* (1) Within 30 days of the conclusion of discovery, the parties shall meet and confer and provide the Board with a joint proposed schedule for pre-hearing and hearing disclosures, submissions, and key events. In the absence of agreement, each party shall submit its own proposed schedule. The schedule shall address, at a minimum, deadlines for submitting the following:

(i) Dispositive motions, motions for summary judgment, and motions in limine, which allow sufficient time for the Board to resolve the motions before the hearing;

(ii) Pre-hearing briefs or statements of the case;

(iii) The identification of lay and expert witnesses for hearing, the general substance of testimony to be offered by each witness, and any depositions that will be used in lieu of witness testimony;

(iv) The exchange of expert reports and statements (if not done during discovery);

(v) Proposed stipulations of fact;

(vi) The exchange of hearing exhibit books;

(vii) The production of any additional documents to be used at the hearing that are not already part of the § 22.4 [Rule 4] file;

(viii) Objections to proposed evidence or § 22.4 [Rule 4] file submissions;

(ix) Date for conducting a pre-hearing conference;

(x) Dates and duration of the hearing; and

(xi) Any other matter necessary for resolution before the hearing.

(2) As soon as practicable after receipt of the parties' proposed schedule(s), the Board will issue an order establishing a schedule for pre-hearing submissions and events, taking into account the parties' proposed schedule, the nature of the case, and the scheduling needs of the Board.

(c) *Pre-hearing conference.* Prior to the hearing, the Board will conduct a pre-hearing conference to discuss such matters as may be necessary to conduct an orderly and efficient hearing. Objections to evidence may be resolved during the pre-hearing conference or at such other time as established by the Board.

(d) *Pre-hearing briefs.* At least 20 days before a scheduled hearing, each party shall file, in accordance with § 22.6(b) of this part [Rule 6(b)], a pre-hearing statement of the case, which shall include the party's legal and factual analysis of the relevant issues, and how the party intends to prove its case.

(e) *Location of hearing.* Hearings will be held at 441 G Street, NW., Washington, DC 20548, unless otherwise ordered by the Board. The Board will consider a request for a hearing at another location if compelling reasons are timely presented.

(f) *Notice of hearing.* The parties, or their counsel, will be given at least 15 days notice of the time and place of a hearing on the merits, provided that the parties may, with the approval of the Board, waive notice and fix a mutually satisfactory time for the hearing. Continuances will not be granted except upon written request and for good cause.

(g) *Nature of hearing.* Hearings may be held by one or more of the panel members of the Board and shall be as informal as may be reasonable and appropriate under the circumstances. Each party may offer the testimony of witnesses, who shall be subject to cross-examination by the opposing party, and such relevant and material evidence as they deem appropriate and as would be admissible under paragraph (h) of this section [Rule 16(h)], subject, however, to the sound discretion of the presiding Board member in supervising the extent and manner of

presentation of such evidence. Stipulations of fact agreed upon by the parties must be in writing, must be filed with the Board, and may be used as evidence at the hearing. The parties may also stipulate to the testimony that would be given by a witness if the witness were present. The Board may at any time during the hearing require evidence or argument in addition to that put forth by the parties.

(h) *Admissibility and weight of evidence.* In general, any relevant and material evidence that would be admissible under the Federal Rules of Evidence will be admitted to the record. However, evidence which may not be admissible under the Federal Rules of Evidence, including hearsay, may be admitted at the discretion of the presiding Board member. The Board may also exclude evidence to avoid unfair prejudice, confusion of the issues, undue delay, waste of time, or needless presentation of cumulative evidence. The weight to be attached to evidence and credibility to be accorded witnesses will be determined by the Board, in its discretion.

(i) *Examination of witnesses.* Witnesses before the Board will be examined orally under oath or affirmation, unless the facts are stipulated or the Board shall otherwise order. If the testimony of a witness is not given under oath, the Board may warn the witness that his or her statements may be subject to the provisions of title 18, United States Code, secs. 287 and 1001, and any other provisions of law imposing penalties for knowingly making false representations in connection with claims against the United States or in any matter within the jurisdiction of any department or agency thereof.

(j) *Availability of witnesses, documents, and other tangible things.* It is the responsibility of a party desiring to call any witness, or to use any document or other tangible thing as an exhibit in the course of a hearing, to ensure that whoever it wishes to call and whatever it wishes to use is available at the hearing. In the event that a witness does not appear or refuses to answer a question, or evidence requested by the Board is not produced, the Board may draw an adverse inference of the fact in

question against the party responsible for providing the witness or evidence.

(k) *Issues not raised by the pleadings.* If evidence is objected to at a hearing on the ground that it is not within the issues raised by the pleadings, it may nevertheless be admitted by the Board, in its discretion, if it is within the proper scope of the appeal. If such evidence is admitted, the pleadings may be amended to conform to the evidence. The Board may also grant the objecting party a continuance to enable it to respond to the evidence.

(l) *Delay by the parties.* If the Board determines that the hearing is being unreasonably delayed by the failure of a party to produce evidence, or by the undue prolongation of the presentation of evidence, it may, by written order or by ruling from the bench, prescribe a time or times within which the presentation of evidence must be concluded, establish time limits on the direct or cross-examination of witnesses, and enforce such order or ruling by appropriate sanctions.

(m) *Exhibits.* Unless otherwise directed by the Board, each party shall prepare (jointly or individually) hearing exhibit books for use during the hearing, and shall provide such books to the Board and opposing counsel at least 3 days before the hearing commences. The books shall consist of documents (or relevant excerpts from documents) placed in a 3-ring binder or similar loose-leaf binder bound on the left margin, separated by numbered tabs, with an index of the documents in the front of each binder. The index shall identify the document by name and, where applicable, the § 22.4 [Rule 4] file citation (tab and Bates numbers). Each document page included in the exhibit books must be marked with the corresponding Bates number or applicable numerical markings used in the § 22.4 [Rule 4] file. Documents not contained within the hearing books shall be marked by the Board during the hearing. Documents contained in the hearing book that are not admitted into evidence during the hearing will not become part of the record unless already part of the § 22.4 [Rule 4] file, or unless their inclusion in the record is requested by the presenting party and permitted by the Board.

§ 22.17

4 CFR Ch. I (1–1–10 Edition)

(n) *Copies.* Copies of documents may be offered and received into evidence as exhibits, provided that they are of equal legibility and quality as the originals, and such copies shall have the same force and effect as if they were the originals. If the Board so directs, the party offering a copy of a document as an exhibit shall have the original available at the hearing for examination by the Board and any other party. When the original of a document has been received in evidence, an accurate copy thereof may be substituted in evidence for the original by leave of the Board at any time.

(o) *Absence of parties or counsel.* The unexcused absence of a party or his authorized representative at the time and place set for the hearing will not be occasion for delay. In such event, the hearing will proceed and the case will be regarded as submitted by the absent party unless he or she appears before the conclusion of the hearing and offers additional evidence.

(p) *Transcripts.* Unless the Board orders otherwise, all hearings will be stenographically or electronically recorded and transcribed. Other conferences and proceedings may be recorded or transcribed by order of the Board. Generally, the Board will arrange for the stenographer to record and transcribe the proceeding. Each party is responsible for purchasing its own copy of the transcript(s) or recording(s). Waiver of recordation and transcription may be especially suitable for appeals resolved under the small claims procedure prescribed in § 22.22(c) of this part [Rule 22(c)].

(q) *Post-hearing briefs.* The Board may require the submission of post-hearing briefs. In such case, briefs shall be filed within 30 days after receipt of the transcript of the hearing, and reply briefs shall be filed within 15 days after receipt of the initial post-hearing briefs, unless such other time period has been established by the Board. Post-hearing briefs shall be filed in accordance with the requirements of § 22.6(b) of this part [Rule 6(b)].

(r) *Post-hearing evidence.* No evidence shall be submitted by any party after the hearing has concluded, including but not limited to post-hearing dec-

larations, unless authorized by the Board in its discretion.

[73 FR 36258, June 26, 2008, as amended at 73 FR 60610, Oct. 14, 2008]

§ 22.17 Submission on the Record Without a Hearing [Rule 17].

(a) *General requirements.* Pursuant to § 22.16(a) of this part [Rule 16(a)], either party may elect to submit its case on the record without a hearing. Submission of a case without a hearing does not relieve the parties from the necessity of proving the facts supporting their claims or defenses.

(b) *Conference in lieu of hearing.* If neither side desires a hearing, either party may request that a conference be held in lieu of a hearing with one or more members of the panel designated to decide the appeal, and such request may be granted at the discretion of the Board. The purpose of the conference is not to introduce new matters or evidence, but to permit explanations and argument of matters of record. If any new matter is introduced at the conference by either party, consideration of the appeal will be deferred until the opposing party has been apprised thereof and has had an opportunity to reply. Both parties will be afforded the right to be present at any such conference. At the request of a party, or on the Board's initiative, the conference may be stenographically or electronically recorded and transcribed pursuant to § 22.16(p) of this part [Rule 16(p)].

(c) *Statement of the case.* The Board, at its discretion, may order a party that submits its case on the record without a hearing to submit a written statement of the case, including a legal and factual analysis of the relevant issues, within such period of time as the Board allows. The Board may also order parties to submit reply briefs. Briefs will be filed in accordance with the requirements of § 22.6(b) of this part [Rule 6(b)].

§ 22.18 Closing the Record [Rule 18].

(a) *Closing the record.* The record will be closed on a date announced by the Board by written notice.

(b) *Supplementing the record after the record is closed.* Except as the Board may otherwise order in its discretion, no evidence shall be received after the